No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN MARITIME ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Maritime Association, Inc. ("AMA") is a non-profit employer trade association whose members own and/or operate U.S.flag vessels in coastwise and ocean-going trade. AMA's members are **Alaska Tanker Company, LLC ("Alaska"); Crowley Maritime Corporation ("Crowley"); Horizon Lines, LLC ("Horizon"); Maersk Line, Limited ("Maersk"); OSG Ship Management, Inc. ("OSG"); and TOTE Services ("TOTE")** (formerly Interocean American Shipping Corp.)

AMA member companies collectively account for the majority of oceangoing vessels now operating under the U.S.flag and are subject to the *Jones Act* and general maritime law. As such, they have a critical interest in whether seamen and others asserting unseaworthiness claims against vessel operators and owners may assert claims for punitive damages.

BACKGROUND

The U.S. merchant marine plays a critical role in supporting the U.S. economy and its national security,

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1. Both Petitioner and Respondent have filed blanket consents to the filing of amicus curiae briefs in this matter.

In accordance with Rule 37.6, counsel certifies that the undersigned authored this brief in its entirety and that no counsel for any party authored any portion of this brief; that no party or party's counsel contributed money to fund the preparation or submission of this brief; and that no party other than the Amicus Curiae contributed money intended to fund the preparation or submission of this brief.

as well as providing humanitarian relief in times of disaster. According to a study by PricewaterhouseCoopers prepared for the Transportation Institute, the domestic maritime industry provides almost 500,000 jobs and some $100 billion in annual economic output.[2] When trade dependent jobs are included, the maritime industry related employment is estimated to be approximately 13 million jobs.[3] It is anticipated that ocean trade will continue to grow, with the value of U.S. imports and exports reaching some $10.5 trillion in 2038.[4]

The AMA member companies together operate more than 150 vessels in both U.S. coastal and international waters. As discussed in more detail below, many of these vessels are under contract with the U.S. government, providing military support for operations overseas, ready to be called into duty on a moment's notice. This fleet transports military vehicles, hardware, combat cargo and supplies to support U.S. troops wherever needed.

SUMMARY OF ARGUMENT

AMA adopts but does not here repeat in detail arguments thoroughly and ably made by counsel for

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2. TRANSPORTATION INSTITUTE, https://www.transportationinstitute.org (last visited January 28, 2019); *America's Maritime Industry: The foundation of American seapower*, NAVY LEAGUE OF THE UNITED STATES, (May 3, 2012), *available at* https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf (last visited January 28, 2019).

3. *America's Maritime Industry: The foundation of American seapower*, *supra* note 2.

4. *Id.*

Petitioner and other amici. The issue before the Court, however, whether punitive damages should be available in a claim for unseaworthiness under general maritime law, has critical implications for the U.S. maritime industry and the national security of the United States. AMA brings before the Court the practical implications of this issue on the industry, on its members, and on national security.

The bar for establishing that a vessel is "unseaworthy" is passingly small, lacking any requirement to prove fault. The effect of permitting punitive damages in such actions, including cases where a plaintiff's own negligence caused or contributed to the unseaworthy condition, would inevitably force employers to settle even non-meritorious claims and could compromise the economic vitality of an industry critical to the transportation of goods; which supports and supplies the nation's military; which is vital to the balance of trade; and which provides much needed emergency and humanitarian relief when supplies must be moved in large quantities to areas devastated by natural disasters.

The case before the Court presents a choice between expanding the range of remedies available to individual mariners and overarching public policy interests. That balance tips decidedly against the availability of punitive damages in these cases.

ARGUMENT

I. The Balance of Competing Interests Militates against the Availability of Punitive Damages

a. "Unseaworthiness" Requires A Modest Showing But Imposes Strict Liability

As repeatedly noted in the Courts below and by the parties, punitive damages are not available under the *Jones Act*. *See* 46 U.S.C.A. § 30104 (West); *see also McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 384 (5th Cir. 2014) (precluding punitive damages). Mariners asserting claims under the *Jones Act* must show negligence. *See, e.g., Rannals v. Diamond Jo Casino*, 265 F.3d 442, 447 (6th Cir. 2001) (*citing* 46 U.S.C.A. § 30104). By contrast, common law unseaworthiness actions require no showing of negligence or fault. *See Rofail v. United States*, No. 04-CV-2502 (CBA), 2009 WL 1703236, at *7 (E.D.N.Y. June 18, 2009) ("The Supreme Court has explained that 'unseaworthiness is a condition, and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.'") (*quoting Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 498 (1971)). It would be a paradox to prohibit punitive damages where there is an actual showing of fault but to permit punitive damages where a minimal showing of unseaworthiness results in absolute liability regardless of fault.

"Unseaworthiness" requires a showing that the vessel is unfit for its intended use. *Faraola v. O'Neill*, 576 F.2d 1364, 1366 (9th Cir. 1978) (*quoting Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960)). This standard is

almost comically easy to meet, and has been established where a drunk mariner returned to his vessel, passed out in the ship's recreation room, and burned himself on a radiator.[5] Supplying beer to a crew "without adequate control" constitutes unseaworthiness.[6] "The failure to instruct about the use of life preservers and the failure to provide a working bathroom resulted in unseaworthiness as a matter of law."[7] A seaman could bring an unseaworthy claim for a back injury allegedly sustained after tripping on a loose plastic sleeve on a carton of soft drinks in the ship's stores.[8] While an injury caused by a mariner with violent proclivities certainly establishes unseaworthiness,[9] so does employment of an officer with no history of violence who injures another crew member.[10] One court has held that the lack of adequate supplies to clean a stove constituted an unseaworthy condition.[11]

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5. *Bentley v. Albatross S. S. Co.*, 203 F.2d 270–71 (3d Cir. 1953).

6. *Reyes v. Vantage S. S. Co.*, 558 F.2d 238, 244–45 (5th Cir. 1977), *on reh'g*, 609 F.2d 140 (5th Cir. 1980).

7. *Deal v. A. P. Bell Fish Co.*, 674 F.2d 438, 442 (5th Cir. 1982).

8. *Martinez v. Sea Land Servs., Inc.*, 763 F.2d 26, 28 (1st Cir. 1985).

9. *Boudoin v. Lykes Bros. S. S. Co.*, 348 U.S. 336, 339–40 *amended sub nom. Boudoin v. Lykes Bros. Steamship Co.*, 350 U.S. 811 (1955); *Wiradihardja v. Bermuda Star Line, Inc.*, 802 F. Supp. 989, 994 (S.D.N.Y. 1992) *citing Claborn v. Star Fish & Oyster Co., Inc.*, 578 F.2d 983, 985–87 (5th Cir.1978).

10. *Casbon v. Waterman S. S. Corp.*, 274 F. Supp. 481, 484 (E.D. La. 1967), *aff'd*, 417 F.2d 1040 (5th Cir. 1969).

11. *Moore v. The Sally J.*, 27 F. Supp. 2d 1255, 1261 (W.D. Wash.

Once unseaworthiness is established and regardless of fault, owners are subject to strict liability even if a crew member's own negligence or misconduct created the condition at issue. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990); *see also Mahnich v. S. S. S. Co.*, 321 U.S. 96, 100 (1944). Once a mariner meets the exceedingly low bar of unseaworthiness, liability is absolute. *Id.*

The bar is set exceedingly low because mariners are considered wards of the court and there is a well-deserved effort to protect them.[12] That does not mean, however, that the interests of an individual mariner outweigh those of a critical industry. This is not an industry that can sustain the financial assault that would be imposed if punitive damages were available to individual mariners. AMA's

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1998). As one court has observed, ". . .unseaworthiness can arise not only from something as nautical as a faulty anchor windlass but from something as unmaritime as the presence on a ship of a hazardous chemical." *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 12 (1st Cir. 1983); *see also Smith v. Ithaco Corp.*, 612 F.2d 215 (5th Cir.1980), *abrogated on other ground by Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (unseaworthiness claim based on seaman's exposure to benzene fumes escaping from the ship's storage tanks); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457 (5th Cir.1976) (unseaworthiness claim based on exposure to noxious fumes escaping from the chemical tank of a barge).

12. "Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve..... [Thus] the owners owe[ ] to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition; and ... for failure to discharge such duty there [is] liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof." *Austin*, 705 F.2d at 12 (*quoting The State of Maryland*, 85 F.2d 944, 945–46 (4th Cir. 1936)).

members compete with foreign owned and crewed vessels that do not provide the same wages and benefits to their employees or meet the same safety and environmental standards. If punitive damages are available in these fish-in-a-barrel cases, even if available only in response to egregious conduct, just the threat of such damages will force higher settlements from companies unwilling to risk an adverse verdict. Moreover, plaintiffs will hardly be left with an inadequate remedy if punitive damages are unavailable; they will still have access to the full panoply of pecuniary damages. Injecting punitive damages into the litigation calculus skews that balance too heavily toward plaintiffs who already enjoy adequate protection and receive full compensation.

b. Maritime Companies Are Crucial to The National Interest And Must Be Protected from Excessive Penalties

The nation has a vital interest in the economic well-being of the maritime industry. AMA's members are not "merely" commercial operations that add to the economy; they are critical to it and to national security. The U.S. merchant marine fleet, "is necessary for the national defense. . .that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency." *Merchant Marine Act of 1936*, 46 U.S.C. App. § 861.

Most AMA companies perform services directly for the United States government through several programs:

- Maritime Administration ("MARAD") serves as strategic reserve sealift capacity. In times of national crisis, these ships are among the first to be called to action to carry cargo, be it for disaster relief or national defense.[13]

- Maritime Security Program ("MSP") is a group of more than 60 vessels that receive subsidies from the United States Government in return for being first available to carry cargo in times of a threat to national security. These vessels carried the vast majority of goods during Operation Desert Storm and other similar conflicts in the Middle East.[14]

- T-AGOS ships operate in contested environments, helping gather intelligence for the Air Force and Navy.[15]

- The Military Prepositioning Force is a fleet of government-owned ships pre-positioned in strategic areas with military equipment and operated by AMA members.[16]

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13. MARAD Maritime Administration, https://www.maritime.dot.gov/ (last visited January 28, 2019).

14. *Maritime Security Program ("MSP")*, MARAD Maritime Administration, https://origin-www.marad.dot.gov/ships-and-shipping/strategic-sealift/maritime-security-program-msp/ (last visited January 28, 2019).

15. *Oceans Surveillance Ships – T-AGOS*, Navy, https://www.navy.mil/navydata/fact_display.asp?cid=4500&tid=600&ct=4 (last visited January 28, 2019).

16. Military Sealift Command, https://www.msc.navy.mil (last visited January 28, 2019).

All of these programs could be compromised from the residual fallout if punitive damages are available. More specifically, **OSG**, which owns and/or operates a 22-vessel U.S.-flag fleet, operates the only two tankers in the U.S. Maritime Security Program. **Maersk** operates tankers chartered to the U.S. government and manages vessels for MSC and other U.S. government agencies. **Crowley**, a third-generation family-owned company, operates a fleet of 107 U.S.-flagged vessels covering all of the United States from Florida to Alaska and in international trade. **Crowley** operates more than 20 vessels owned by the U.S. Government, both for MARAD and MSC, performing critical sealift and national security functions, and was instrumental in the destruction of chemical weapons in Syria. **TOTE** has numerous government contracts. It acts as the ship operator to MSC's USNS VADM KR WHEELER, an offshore petroleum distribution system that can transfer fuel from a tanker to depots ashore from up to eight miles off the coast. Similarly, it manages the SS Petersburg, a tanker owned by MARAD that pumps fuel from a position four miles offshore, which is of obvious utility in times of war. **TOTE** managed the technical conversion of two government owned tracking and telemetry ships in service to the Missile Defense Agency. It also provides ship management for six MARAD vessels that are part of the MARAD Ready Reserve Force. **TOTE** is responsible for the maintenance, surveillance and monitoring of a nuclear ship in decommissioning protective storage.

Not only is the availability of these ships critical to national security, but perhaps even more critical is the training and knowledge of a crew of U.S. citizens to operate these tankers immediately in a time of crisis.

Loyalty to the U.S., the knowledge of AMA crews as to navigating foreign ports, and their relationships with those operating foreign ports and terminals provide necessary elements and support for our national security. Forcing these companies to pay (or to be threatened with) punitive damages could cripple the industry and, by extension, the national defense.

AMA members' ships also are critical to emergency relief. After Hurricane Maria devastated Puerto Rico in September 2016, **Crowley** was able to reopen its local terminal and warehouse within two days. **Crowley** was delivering commercial and government relief within two hours after San Juan harbor opened. In the ensuing months, **Crowley** transported goods for FEMA, U.S. AID and others, and increased its capacity to Puerto Rico by 67 percent, transporting more than 100,000 TEUs[17] of relief and recovery supplies, including 40,000 electrical poles and more than 7,000 transformers for the electrical grid. In one 182-day stretch, **Crowley** unloaded 200 vessels.[18] Similarly, **TOTE** responded to hurricane relief situations by operating additional vessels with only a few days' notice, providing housing for FEMA workers responding to hurricane aid. Like **Crowley**, **TOTE** companies

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17. A "TEU", or a Twenty Foot Equivalent Unit is the volume of goods that can be placed in a twenty-foot shipping container. FLEXPORT, https://www.flexport.com/glossary/twenty-foot-equivalent-unit (last visited January 28, 2019).

18. *Crowley receives humanitarian award for Puerto Rico relief efforts*, MARINE LOG, https://www.marinelog.com/index.php?option=com_k2&view=item&id=29548:crowley-receives-humanitarian-award-for-puerto-rico-relief-efforts&Itemid=231 (last visited January 28, 2019).

responded during Hurricane Maria to bring supplies to Puerto Rico by contracting additional support barges to provide relief to those in need facing the devastation left by the Hurricane.

AMA members operate with enviable success. In almost 17 years, **Alaska** has carried **1.4 *billion*** barrels of crude and has spilled less than 2.2 gallons. In recent years **Crowley** has invested billions of dollars in the *Jones Act* trade, including two new state of the art, environmentally friendly ships fueled by liquid natural gas. **Horizon's** four *Jones Act* vessels often are the sole lifeline to island economies and remote locations in Alaska. Without those ships, those communities would be at risk.

Thus, AMA members, who perform these vital roles, are faced with an untenable economic threat, one that is largely uninsurable. Again, the competing interest here is that of individual mariners who already have access to a full remedy. The balance seems clear.

CONCLUSION

The U.S.-flag fleet is critical to national defense, to emergency preparedness, to the balance of trade, and to emergency and humanitarian relief. Mariners injured because a vessel meets the slight standard of unseaworthiness have a full range of pecuniary recovery available to them in such actions and under the *Jones Act*. Adding the threat of punitive damages will injure an industry critical to the nation's well-being for the benefit of individual mariners with access to other relief. Such an expansion of remedies is unnecessary and potentially devastating to an industry upon which the United States so heavily relies.

Respectfully submitted,

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